

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BEECHWOOD DEVP., LLC, a Wisconsin
limited liability company,

Plaintiff,

v.

OLYMPUS TERRACE SEWER DISTRICT, a
Washington municipal corporation, and
PATRICK SORENSEN, an individual

Defendants

No. C05-0745-MJP

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS 42 U.S.C. §
1983 CLAIM

This motion comes before the Court on Defendants' request for dismissal of Plaintiff's 42 U.S.C. § 1983 claim. Plaintiff alleges a substantive due process violation based on the deprivation of the use and enjoyment of \$200,000 caused by Defendants' allegedly illegal overcharging for sewer access. Defendants argue that the claim fails because it does not meet the requirements for a substantive due process claim. The Court GRANTS Defendants' 12(b)(6) motion and DISMISSES the 42 U.S.C. § 1983 claim for failure to state a claim. Plaintiff unsuccessfully alleges a violation of substantive due process under the Fourteenth Amendment because Defendants' alleged actions do not meet the "shocks the conscience" test. Additionally, the overcharged fees do not support a takings claim under the Fifth Amendment.

BACKGROUND

Defendant Olympus Terrace Sewer District ("the District") provides sewer service to Paine Field in Snohomish, WA. RCW 57.08.005(10) gives the District the power to charge a reasonable

1 connection fee established by an adopted comprehensive plan. Under RCW 57.16.010(6) the District's
2 Board of Commissioners must adopt the comprehensive plan by resolution. However, in March 1998
3 the plan was adopted by voice vote. In April 1999 the District adopted a resolution increasing sewer
4 connection fees based on a recommendation in a consulting firm's financial analysis. The
5 recommendation was not part of a comprehensive plan adopted by resolution. Rate increases were
6 affected in the same manner in October 2002, July 2004, and October 2004. The July and October
7 2004 increases were approved even though the consulting firm recommending the changes advised the
8 District that it needed to adopt a comprehensive plan. Finally, in March 2005 the comprehensive plan
9 was adopted and the District came into compliance with the RCW.

10 Plaintiff Beechwood Development won the right to build a hotel on Paine Field in Snohomish
11 County, subject to a negotiated lease which provides for "reasonable charges" for sewer connection
12 and fees. Beechwood was required to pay an excess of \$300,000 for a connection fee not properly
13 adopted.

14 DISCUSSION

15 Courts should not dismiss a complaint for failure to state a claim under Fed. R. Civ. P.
16 12(b)(6) unless it appears, without a doubt, that the plaintiff cannot prove any set of facts in support
17 of its claim that would entitle relief. Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th
18 Cir. 2000); Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999). The Court must accept the
19 allegations of the complaint and should construe them liberally and in the plaintiff's favor. Scheur v.
20 Rhodes, 416 U.S. 232, 236 (1974).

21 For a civil rights claim under §1983, Plaintiff must establish a deprivation of a federal
22 constitutional or statutory right by a person acting under color of state law. Parratt v. Taylor, 451 U.S.
23 527, 535 (1981). To base a civil rights claim on a violation of substantive due process Plaintiff must
24 show a deprivation of life, liberty or property as established by the Fourteenth Amendment. Squaw
25 Valley Development Co. v. Goldberg, 375 F.3d 936, 948 (9th Cir. 2004); Nunez v. City of Los

1 Angeles, 147 F.3d 867, 871 (9th Cir. 1998). A takings claim under the Fifth Amendment requires a
2 showing that the state actor took a recognizable property interest without just compensation.

3 **I. Substantive due process is not the proper foundation for Plaintiff's claim**

4 Plaintiff defines the federal rights violation as a deprivation of substantive due process
5 guaranteed by the Fourteenth Amendment. Plaintiff alleges that Defendants deprived it of a property
6 interest, specifically the use and enjoyment of \$200,000, when Defendants overcharged sewer
7 connection fees based on rates improperly established under state statutes. Plaintiff cites several cases
8 for the proposition that "Beechwood's monetary property interest falls squarely within the due process
9 protection afforded by the Fourteenth Amendment." (Pl.'s Response at 5). However, these cases apply
10 to procedural due process instead of substantive due process. Procedural due process authority does
11 not hold for substantive due process.

12 Courts have become wary of substantive due process and have restricted its application.
13 "[R]ecent jurisprudence restricts the reach of the protections of substantive due process primarily to
14 liberties 'deeply rooted in this Nation's history and tradition.'" Armendariz v. Penman, 75 F.3d 1311,
15 1319 (9th Cir. 1996). Although interest in property is an historically important right, "the use of
16 substantive due process to extend constitutional protection to economic and property rights has been
17 largely discredited." Id. at 1318-19. The Fourteenth Amendment has been limited to protection from
18 state interference with personal liberties like privacy and bodily integrity. Id. at 1319.

19 In order to stem the growth of substantive due process, courts have turned to more specific
20 constitutional protections to challenge government action. "[W]hen an explicit textual provision of the
21 Constitution protects against the challenged government action, the claim must be analyzed under that
22 specific provision alone." Macri v. King County, 126 F.3d 1125, 1128 (9th Cir. 1997). Since Plaintiff
23 alleges that Defendants deprived Plaintiff of property, the civil rights claim is more appropriately
24 lodged under the Fifth Amendment Takings Clause which addresses government appropriation of
25 private property. In fact, the Ninth Circuit has specifically found that substantive due process claims

1 based on government interference with property are preempted by the Fifth Amendment Takings
2 Clause. See, Squaw Valley, 375 F.3d at 949; Madison v. Graham, 316 F.3d 867, 871 (9th Cir. 2002);
3 Macri, 126 F. 3d at 1129. This holds true even if the Takings claim would be unsuccessful. Squaw
4 Valley, 375 F.3d at 949. As a result, Plaintiff's § 1983 claim should be grounded in a Fifth
5 Amendment Takings allegation.

6 **II. Even if applicable, Plaintiff does not have a substantive due process claim**

7 If substantive due process applies to the interest in the money, Plaintiff must show a
8 deprivation of life, liberty or property as established by the Fourteenth Amendment. Squaw Valley,
9 375 F.3d at 948; Nunez, 147 F.3d at 871. Plaintiff urges the Court to use a Washington Supreme
10 Court test for substantive due process from Presbytery of Seattle v. King County, 114 Wn.2d 320,
11 331-32 (1990). Since Plaintiff alleges a federal civil rights violation to be determined under federal
12 law, this test does not bind the Court. Additionally, the test is not on point as it applies to deprivations
13 associated with land use. Plaintiff does not claim a violation of the right to use land but of the right to
14 enjoy personal property.

15 The correct test for substantive due process claim in the Ninth Circuit provides that substantive
16 due process "forbids the government from depriving a person of life, liberty, or property in such a way
17 that 'shocks the conscience' or interferes with rights implicit in the concept of ordered liberty.'" Nunez, 147 F. 3d at 871; Squaw Valley, 147 F. 3d at 871. These cases require Plaintiff to prove a set
18 of facts that demonstrates that the District's actions were so arbitrary and unreasonable as to "shock
19 the conscience." Id.; United States v. Salerno, 481 U.S. 739, 746 (1987).

21 Plaintiff has not alleged a set of facts that would support the substantial burden posed by this
22 test. The complaint details the multiple analyses performed by consulting firms to determine
23 appropriate rates for sewer connection fees. Although the District may have adopted the rate schedule
24 without conforming to state law, the analysis and planning used to determine the rate does not point to
25 arbitrary and unreasonable actions that "shock the conscience."

1 III. The Takings Clause as a foundation for Plaintiff's claim

2 Since Plaintiff alleges that the District unlawfully took its property, Plaintiff's claim is properly
3 stated under the Takings Clause of the Fifth Amendment rather than Fourteenth Amendment
4 substantive due process. Plaintiff's loss of money due to overcharging does not constitute a successful
5 takings claim. Although property has been taken for public use, (i.e. maintenance of the sewage
6 system), fees collected for this government service generally do not constitute a taking of property.

7 [T]he principles of takings law that apply to real property do not apply in the same
8 manner to statutes imposing monetary liability. Thus, even though taxes or special
9 municipal assessments indisputably "take" money from individuals or businesses,
10 assessments of that kind are not treated as per se takings under the Fifth Amendment.

11 Branch ex. Rel. Maine Nat'l Bank v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995). See also,
12 United States v. Sperry Corp., 493 U.S. 52, 63 (1989) (a reasonable user fee is not a taking if imposed
13 to reimburse the government for services); Union Elec. Co. v. United States, 363 F.3d 1292, 1296
14 (Fed. Cir. 2004) (special assessments do not constitute a taking because the Takings Clause does not
15 apply to legislation requiring payment of money); Commonwealth Edison Co. v. United States, 271
16 F.3d 1327, 1339 (Fed. Cir. 2001) (obligation to pay money is not an unconstitutional taking);
17 Longshore v. United States, 77 F.3d 440, 443 (Fed. Cir. 1996) (fee required by Congress to
18 participate in lottery for cellular radio license did not violate Takings Clause even if in excess of
19 amount needed to recoup handling cost); Abney v. Alameida, 334 F. Supp. 2d 1221, 1228 (S.D. Cal.
20 2004) (a reasonable user fee is not a taking if imposed to reimburse the government for services).

21 The cases emphasize that reasonable fees are not takings. An assessment, fee or tax may be a
22 taking if "the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation
23 of particular property." Houck v. Little River Drainage Dist., 239 U.S. 254, 265 (1915). See, Roedler
24 v. Doe 255 F.3d 1347, 1356 (Fed. Cir, 2001); Garneau v. City of Seattle, 147 F.3d 802, 817 (9th Cir.
25 1998) (Williams, D.J., concurring). This abuse might stem from a disproportionate expenditure for the
benefit conferred. Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 220 (1915). The abuse might also arise

1 from unreasonable or excessive fees. In this case, Plaintiff does not argue that the fees themselves
2 were unreasonable or excessive in nature, nor does Plaintiff claim that the amount paid to the District
3 exceeded the benefit received in services. Instead, Plaintiff argues that the rate was too high based
4 solely on the legal technicalities of state law. If the Defendants followed the statutes to the letter of the
5 law, Plaintiff appears to have no dispute about the fee charged. As a result, the fee itself seems to be a
6 “reasonable users fee” even if the method used to adopt the fee was not reasonable. The sewer
7 connection fee does not to satisfy the “flagrant abuse” or unreasonable/excessive nature requirement
8 needed to qualify as a taking.

9 Even if the Court assumed the fees were excessive, Plaintiff still does not state a claim under
10 the Takings Clause due to failure to exhausted state remedies. A takings claim does not become ripe
11 until a plaintiff has sought compensation through state procedures. Macri, 126 F.3d at 1129. Since
12 Plaintiff’s complaint includes state claims seeking repayment, Plaintiff has not exhausted the remedies
13 available within the state system.

14 The Court’s dismissal the 42 U.S.C. § 1983 claim renders Defendant Sorensen’s qualified
15 immunity defense moot. Additionally, with the dismissal of Plaintiff’s federal cause of action, the only
16 basis for subject matter jurisdiction is diversity jurisdiction. Should the Court conclude that diversity is
17 lacking, the Court will decline to exercise supplemental jurisdiction over the remaining state claims.
18 Such claims are best suited for the state judicial system.


19 CONCLUSION

20 Plaintiff has not established a claim that can serve as the foundation for a 42 U.S.C. § 1983
21 claim. The deprivation of property alleged renders the claim a takings claim under the Fifth
22 Amendment rather than a substantive due process claim under the Fourteenth Amendment. Fees
23 collected for government service usually do not qualify as takings unless they are excessive or abusive.
24 Even if the fees charged by the district are unreasonable, Plaintiff does not have a takings claim
25

1 because it has failed to exhaust its state remedies. The Court GRANTS Defendant's motion and
2 DISMISSES the 42 U.S.C. § 1983 claim under Fed. R. Civ. P. 12(b)(6).

3 The clerk is directed to provide copies of this order to all counsel of record.

4 Dated: August 15, 2005

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8 Marsha J. Pechman
9 United States District Court
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